

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

RIVER CITY MEDIA, LLC, a Wyoming)
3 limited liability company, MARK)
FERRIS, an individual, MATT)
4 FERRIS, an individual, and AMBER)
PAUL, an individual,)
5)
Plaintiffs,)
6)
vs.)
7) Civil Motion Hearing
KROMTECH ALLIANCE CORPORATION,)
8 a German corporation, CHRIS) Pages 1 - 41
VICKERY, an individual, CXO)
9 MEDIA, INC., a Massachusetts)
corporation, INTERNATIONAL DATA)
10 GROUP, INC., a Massachusetts)
corporation, and STEVE RAGAN,)
11 an individual, and DOES 1-50,)
12)
Defendants,)

BEFORE THE HONORABLE STANLEY A. BASTIAN
UNITED STATES DISTRICT COURT JUDGE

15 | APPEARANCES:

16 For the Plaintiffs: LEEOR NETA
17 Attorney at Law
505 Montgomery St., 11th Floor
San Francisco, California 94111

18 For the Defendant CXO: WILLIAM J. STOWE
19 Attorney at Law
20 1401 McKinney St., Ste. 1900
Houston, Texas 77010

21 KEVIN J. CURTIS
22 Attorney at Law
601 W. Riverside Ave., Ste. 1900
Spokane, Washington 99201

23 For the Defendant Vickery: EDWARD C. CHUNG
24 (By Telephone) Attorney at Law
1511 Third Ave., Ste. 1088
25 Seattle, Washington 98101

1 Official Court Reporter: Allison R. Stovall, CRR, RPR, CCR
2 United States District Courthouse
3 P.O. Box 700
Spokane, Washington 99210
(509) 458-3465

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River City v. Kromtech, et al/2:17-cv-00105-SAB
Civil Motion Hearing

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1 (Court convened on March 15, 2018, at 2:40 p.m.)

2 THE COURTROOM DEPUTY: The matter now before the Court
3 is *River City Media, LLC, et al, versus Kromtech Alliance*
4 *Corporation, et al,* Case No. 2:17-cv-105-SAB.

5 Counsel, please state your presence for the record.

6 MR. NETA: Good afternoon, Your Honor. Leeor Neta for
7 the Plaintiffs River City and Amber Paul, Mark Ferris, and Matt
8 Ferris.

9 THE COURT: Okay. You're the only plaintiffs'
10 attorney here today, though; is that correct?

11 MR. NETA: That's correct, Your Honor.

12 THE COURT: Very good.

13 MR. STOWE: Your Honor, William Stowe on behalf of CXO
14 Media, Inc., Steven Ragan, and International Data Group, Inc. I
15 have with me co-counsel, Kevin Curtis, as well.

16 THE COURT: All right. Thank you.

17 Good afternoon to -- and we have someone on the phone.
18 Who's on the phone, please?

19 MR. CHUNG: Thank you, Your Honor. This is Edward
20 Chung on behalf of the Defendant Christopher Vickery. I was
21 putting myself on mute; hard to do, but I was told to go ahead
22 and do that. So I'll continue putting myself on mute at this
23 point.

24 THE COURT: All right. Thank you.

25 All right. We're here for some pretrial motions. As I

1 understand them, we have the plaintiffs' motion to amend the
2 complaint and a motion regarding discovery filed by one of the
3 defendants. I reviewed all of the paperwork pleadings on both
4 of those motions.

5 I'm just kind of wondering the way -- I mean, they're both
6 ripe for decision today, or after today, but I'm wondering,
7 Mr. Neta, you actually have the motion to amend pending, yet
8 discovery regarding jurisdiction is not completed. So is it
9 really appropriate that we -- I mean, shouldn't we get discovery
10 done or decide that discovery's done before you have an amended
11 complaint on file?

12 MR. NETA: I'd certainly prefer that, Your Honor. I
13 think the reason why we went ahead and filed the motion for
14 leave to amend the complaint is because I asked defendants'
15 counsel to stipulate to extend that deadline and they refused;
16 so I wanted to make sure that that was filed on time. If Your
17 Honor is willing, I prefer to have the discovery motion heard,
18 resolved, however it goes, and then plaintiffs would be having
19 an opportunity to amend it.

20 THE COURT: Okay. Your answer helps clarify exactly
21 the nature of where we are today.

22 Gentlemen, I left some paperwork on my desk right through
23 that door. I'm just going to grab it. Stay where you are. It
24 won't take me ten seconds.

25 (Off the record.)

1 THE COURT: Let's deal with the defendants' motion on
2 discovery. It is the defendants' motion, correct?

3 MR. STOWE: No, Your Honor.

4 THE COURT: It's the plaintiffs' motion. Sorry.

5 MR. STOWE: And I believe it's only -- there's only
6 been one -- I thought the hearing today was for the motion -- I
7 think you said there were two motions today's hearing was about?

8 THE COURT: I -- my records show that the motion to
9 amend is also noted for hearing today.

10 MR. STOWE: And recall Your Honor also gave them an
11 extension to amend until, I believe, tomorrow.

12 Is what you requested, correct?

13 MR. NETA: Well, we did not request anything in
14 particular, Your Honor, but we were hoping to have the discovery
15 motion resolved before any requirement was placed on us to
16 amend.

17 THE COURT: No, I understand that, and that makes
18 sense, but I just want to see. The motion to amend is ECF 91,
19 and that has it without oral argument but today at -- oh,
20 tomorrow. I'm sorry. I am a day ahead. Thanks for that
21 clarification.

22 MR. STOWE: But Your Honor, it actually extended the
23 amendment deadline. After they filed the motion for extension
24 of the amended pleadings deadline, Your Honor granted that, and
25 so the extended period to amend is tomorrow, March 16th. So I

1 agree that their old motion to amend, I don't think they're
2 bound by that. They can file another amendment tomorrow. I'm
3 just pointing out because it sounded like we were on different
4 pages on that.

5 THE COURT: Okay. You're right. I apologize. But
6 the point that I was trying to make -- I was a little confused
7 on the date. You're correct. But the point I'm trying to make
8 is that -- I apologize for my cold -- but that we have a motion
9 regarding discovery. I realize the defendants are saying enough
10 is enough -- my summary, not yours -- but we should get
11 discovery clarified before we proceed to what the amended
12 complaint looks like. So all right. So I think everybody
13 agrees with that.

14 Let's hear your argument on the discovery motion, Mr. Neta.

15 MR. NETA: Thank you, Your Honor. I think a lot of
16 our argument's in the briefing, but I will just quickly point
17 out that I think this case is a lot like the case of *Keeton*
18 *versus Hustler Magazine*, which we cite in our -- in our
19 briefing, in which the circulation of some magazines that really
20 had nothing to do with the allegedly libelous material was found
21 to create a basis for personal jurisdiction. We've since
22 submitting our briefing have obtained some evidence to suggest
23 that CSOonline, the media outlet at issue in this case, has as
24 many as 20,000 page views per month; compare that with what was
25 going on in *Keeton*, where there was anywhere from ten to fifteen

1 thousand copies circulated.

2 THE COURT: Well, these are facts. What I'm really
3 more interested in is we have -- I mean, these are disputed
4 facts, perhaps --

5 MR. NETA: Right.

6 THE COURT: -- but I don't know that it really helps
7 me answer the question. The question is discovery.

8 MR. NETA: Yes, Your Honor.

9 THE COURT: And there's five -- and number five's got
10 subparts, but there's five different questions that the
11 defendants object to and that you want the Court to rule on.
12 Right now, discovery is focused on jurisdiction. At the time
13 that I ruled on the motions to dismiss last August, it appeared
14 that jurisdiction was -- that the jurisdiction you were seeking
15 was specific, not general.

16 So how -- how do these discovery requests relate to
17 jurisdiction, and specifically either to specific or general?
18 And I also take note of the fact that your -- your complaint and
19 your amended complaint, which perhaps you could do a new one by
20 tomorrow, but you haven't alleged general jurisdiction. So
21 respond to that. I -- I really don't care how many hits they
22 get on the computer. That's just not relevant right now.

23 MR. NETA: Of course. Understood. I agree. And I
24 think a lot of the confusion was dealt with by the fact the
25 opposition focused so much on this issue of what is specific

1 versus general. But these questions, if you look at them, Your
2 Honor, Request For Production 3 through 6 and Interrogatory
3 No. 3, they're drilling down into writ large what are CXO's
4 contacts within the forum state.

5 THE COURT: So number one, "Produce all documents
6 related to CXO Media's relationship with IDG." What does that
7 have to do with jurisdiction?

8 MR. NETA: Well, that was actually an issue that you
9 raised in your order denying defendants' motions to dismiss.
10 One of the lines of your order specifically stated that we could
11 take discovery on the relationship between CXO and IDG for the
12 purposes of determining whether or not there was some sort of an
13 agency relationship that would draw IDG into this case. It
14 wasn't --

15 THE COURT: It's not jurisdiction-specific then.

16 MR. NETA: It's not jurisdiction specifically. Then
17 at the end of your order, Your Honor, you do say,
18 "jurisdictional discovery," so that's how this question sort of
19 was drawn into this dispute.

20 THE COURT: Okay. Number two, "Produce all documents
21 related to CXO's advertising and marketing of CXO's media
22 properties in the state of Washington." How is that relevant to
23 specific or general jurisdiction?

24 MR. NETA: Well, it's directly relevant to specific
25 jurisdiction because it inquires about CXO's contacts with the

1 forum state. Contacts with the forum state are the basis for
2 determining personal jurisdiction, and for that purpose, I can
3 cite to the *Yahoo versus La Ligue Contre Le Racism* and
4 anti-Semitism case, the Ninth Circuit case which we cite in our
5 briefing. In that case, it says, "In any personal jurisdiction
6 case, we must evaluate all of a defendant's contacts with the
7 forum state." And from an opinion by Judge Coughenour in the
8 Western District of Washington that was issued several years ago
9 citing that case, he says the following: "Merely demonstrating
10 that a nonresident defendant has limited or no contacts with a
11 particular plaintiff does not dispose of the personal
12 jurisdiction inquiry." These questions all deal with what their
13 contacts are with the state, and that's important for evaluating
14 personal jurisdiction.

15 THE COURT: Number three, "Produce all documents
16 related to total sales of each of CXO's ... products or
17 services, including subscriptions or memberships to magazines or
18 news sites, ... print or online, in the United States
19 generally ..." How does that relate to specific jurisdiction
20 in the state of Washington?

21 MR. NETA: By asking this question, "in the United
22 States generally and to Washington residents specifically,"
23 again, we're trying to get --

24 THE COURT: No, no, but that's really two questions,
25 and I was specific.

1 MR. NETA: I see.

2 THE COURT: United States, generally, I mean, all the
3 -- the only thing I've seen in pleadings so far is specific
4 jurisdiction allegations.

5 MR. NETA: Okay. The reason why we asked this
6 question in the way that we phrased it, to try to get a sense of
7 the degree to which Washington was of an overall percentage of
8 U.S. in general so that we could tell perhaps to what extent CXO
9 is focusing on Washington vis-à-vis the U.S., but if we're --

10 THE COURT: But is that really relevant to a specific
11 jurisdiction? I mean, specific jurisdiction is the intent by
12 the defendant to do something in this state that would allow the
13 victim of their actions to sue them here.

14 MR. NETA: Right.

15 THE COURT: And so what -- how is it relevant that I
16 would know, just to make up some facts, that 52 percent of their
17 revenue is generated by the state of Washington versus the
18 United States? Why -- why is that relevant? What we really
19 need to know is that they did something specific in the state of
20 Washington. We don't really care what they did in Florida.

21 MR. NETA: Sure. So if that's true, Your Honor -- and
22 -- and I don't disagree with your point.

23 THE COURT: Okay.

24 MR. NETA: If they're advertising and they're
25 targeting people in the state of Washington, they're trying to

1 get Washington consumers and Washington eyes on their website,
2 and any effort in that respect alone is enough to establish the
3 low bar for specific personal jurisdiction, then I would agree,
4 but I think we phrased it in such a way to get a percentage, but
5 I understand where you're coming from.

6 THE COURT: Number four, "Produce all documents
7 related to CXO Media's income derived from advertising on its
8 websites to Washington state residents." How's that different
9 than the second part of number three?

10 MR. NETA: When you say, "number three," Your Honor,
11 you mean...

12 THE COURT: Well, I've just -- in my notes, I just
13 have them one through --

14 MR. NETA: Request for No. 5?

15 THE COURT: I -- I didn't use your numbering so I'm --

16 MR. NETA: That's fine.

17 THE COURT: -- confusing you. I'm sorry.

18 MR. NETA: No, no, no. It's fine. I think in this
19 instance, it's specifically talking about income derived from
20 advertising versus subscriptions or memberships to magazines,
21 and that's different because on the one hand, you're talking
22 about consumers in Washington, consumers of their content,
23 people who have subscriptions; and the other one, you're talking
24 about advertising. There are companies that choose to contract
25 with CSOonline, CXO's media property, to provide content,

1 advertising of their products, in the state of Washington
2 because they know Washington consumers read CSOonline. And so
3 one -- one really deals with advertising. The other one deals
4 with subscriptions and memberships.

5 THE COURT: All right. Now, one of the issues that
6 you brought up in the pleadings is that you're not waiving the
7 right to bring an amended complaint based on general
8 jurisdiction, but I realize this case is kind of on the
9 fast-track, or at least it has been -- and not something I did
10 but something the parties did. But there's been nothing in the
11 plaintiffs' pleadings so far to even suggest that you have any
12 facts to show general jurisdiction.

13 I mean, I'm going to really simplify it. What general
14 jurisdiction means for a company that -- for the state of
15 Washington, you're Microsoft or you're Boeing. I mean, this is
16 -- this is your residence. You do everything here. You sell
17 your products throughout the world, but if somebody buys your
18 product in Florida and is injured or has an allegation against
19 you, they, from Florida, can come here and sue you. That's what
20 general jurisdiction is. I haven't seen anything in the
21 pleadings to suggest that the plaintiffs are headed down that
22 path.

23 MR. NETA: There is this notion of alter ego theory of
24 general personal jurisdiction, which we're open to alleging and
25 pleading more details and facts about to the extent discovery

1 demonstrates it. But what we've seen is that in a number of
2 Third Circuit opinions, that theory allows for jurisdiction over
3 a parent whose subsidiary is subject to jurisdiction within a
4 state. Now, I'm not sure --

5 THE COURT: But if they're two different corporations,
6 don't you have to pierce the veil somehow, I mean?

7 MR. NETA: There may be something about that, but
8 again, we're at the discovery stage, which is the point of
9 engaging in this. If we come back with discovery from CXO at
10 this point and IDG, and it determines definitively, Listen,
11 there's no basis for really piercing the corporate veil here,
12 which is why we asked for some of these questions, then I think
13 certainly we would focus on what's important because we're
14 trying to drill on down on this issue and move the case forward.

15 THE COURT: Okay. Do you have anything else you'd
16 like to say before I hear from the defendants? I'm being very
17 specific, and I -- I have to say that I think I explain it
18 because I make a point of explaining it when we have scheduling
19 conferences, but it's explained in the order that I make myself
20 available for informal discovery disputes, and -- and you didn't
21 follow that.

22 MR. NETA: I'm sorry, Your Honor.

23 THE COURT: Which means, you know, I've got a lot of
24 reading to do.

25 MR. NETA: And -- and I apologize. I think it was the

1 freneticism around ensuring that we get this motion, if needed
2 to be, before we had to amend. Quickly before I sit down, I'll
3 just point out again, as I said earlier, this is an internet
4 case. It's not a case that involves a contract or something
5 like that; and for that reason, we need to focus on internet
6 cases and their view of personal jurisdiction.

7 THE COURT: All right. So before you sit down, I
8 guess I need to hear from you very specifically on these two
9 issues. One, why should the Court allow you to engage in
10 discovery on general jurisdiction? Two, on the issue of
11 specific jurisdiction, what specifically -- and I'm using
12 "specifically" in two different ways here. What specifically in
13 the discovery request made, what specifically do you need before
14 you'd be in a position to make final decisions on an amended
15 complaint?

16 MR. NETA: Well, I think, Your Honor, we -- we need to
17 know the extent to which --

18 THE COURT: No, just -- don't give me an explanation.
19 Just give me --

20 MR. NETA: Oh, very specifically?

21 THE COURT: Yeah.

22 MR. NETA: Advertising, revenue --

23 THE COURT: No, no. Tell me the numbers. I mean,
24 I've got your request, and that's what it's --

25 MR. NETA: Oh, the request for production. Oh, yes.

1 Got it. We can -- we can, I think, forget about No. 3 for the
2 time being.

3 THE COURT: And read No. 3 to me because I'm using
4 different numbers.

5 MR. NETA: Of course. Request For Production No.3 is
6 "Produce all documents related to CXO Media's relationship with
7 IDG, Inc." We'll concede --

8 THE COURT: Okay.

9 MR. NETA: -- we don't need that one for now.

10 THE COURT: All right.

11 MR. NETA: I think if we were to obtain No. 4,
12 "Produce all documents related to CXO's advertising and
13 marketing of CXO's media properties in the state of Washington,"
14 that would be very helpful.

15 THE COURT: So you believe you need No. 2. I've got
16 that as No. 2. What do you call it? What number is that for
17 you?

18 MR. NETA: That is Request For Production No. 4, Your
19 Honor.

20 THE COURT: Okay.

21 MR. NETA: And then Request For Production No. 5.

22 THE COURT: And give that one to me so I'm using the
23 same ones.

24 MR. NETA: Of course. "Produce all documents related
25 to total sales of each of CXO Media's products or services,

1 including subscriptions or memberships to magazines or news
2 cites ..."

3 THE COURT: I have that.

4 MR. NETA. "... whether print or online." We could --
5 we could tailor that to remove the language "in the United
6 States generally".

7 THE COURT: All right.

8 MR. NETA: If -- if Your Honor --

9 THE COURT: I really --

10 MR. NETA: -- is trying to split the baby.

11 THE COURT: All right.

12 MR. NETA: And then No. 6, "Produce all documents
13 related to CXO Media's income derived from advertising on its
14 websites to Washington state residents."

15 THE COURT: Okay.

16 MR. NETA: One thing we didn't talk about, Your Honor,
17 is Interrogatory No. 3. And based on what you've said, in an
18 effort to try to be conciliatory -- it has six parts, and I
19 think if we just focus on the ones that deal with consumers in
20 the state of Washington, that would be sufficient for our
21 purposes.

22 THE COURT: Okay. All right. That's very specific,
23 and I appreciate that.

24 MR. NETA: Anytime, Your Honor.

25 THE COURT: Let's hear from the defense.

1 MR. STOWE: Yes, Your Honor. William Stowe on behalf
2 of CXO and IDG and -- and Steve Ragan. There's a fundamental
3 difference between general and specific jurisdiction. Your
4 Honor hit on it.

5 THE COURT: So why shouldn't I allow the plaintiffs,
6 since we still have an open door as to an amendment? I mean, I
7 assume if we get to the amendment, we might extend it more, but
8 right now they've still got 24 hours -- 26 hours. Why shouldn't
9 they be allowed to amend and make allegations as to general
10 jurisdiction?

11 MR. STOWE: Because it's -- well, if you're saying
12 not -- I'm not contesting the fact that they could amend right
13 now. They -- the problem is they haven't, and there's a reason
14 they haven't. They know they cannot satisfy --

15 THE COURT: Well, I don't know that. That's -- that's
16 your assumption.

17 MR. STOWE: Your Honor, after the *Daimler* case, as you
18 pointed out --

19 THE COURT: Yeah, but you haven't answered these --
20 these discovery requests.

21 MR. STOWE: We have as to -- as to the portions
22 relating to these facts. So for example, let's take the first
23 one that they don't -- they haven't given up on, the Request For
24 Production No. 4. "Produce all documents related to CXO's
25 advertising and marketing of CXO's media properties in the state

1 of Washington." So we gave -- we said, "Look, you sued us over
2 the Ragan article, a specific Ragan article. You've alleged
3 specific jurisdiction. We're going to give you this stuff.
4 We're going to tell you the number of views from the state of
5 Washington of that article. We're going to tell you the revenue
6 that we got on that.

7 THE COURT: But they want more.

8 MR. STOWE: That's right; they do. But that's -- that
9 more -- for example, revenue related to other articles having
10 nothing to do with this case, that would be general
11 jurisdiction. And to answer your question, why -- why not
12 just --

13 THE COURT: Not necessarily. I mean, let's say there
14 were three articles involved, and maybe the contacts with the
15 Ragan article are particularly concerning, could go either way,
16 but the contacts with articles one and two, which are just made
17 up for purposes of my scenario, are a little bit stronger.
18 Wouldn't that be enough to show a specific jurisdiction?

19 MR. STOWE: No, because it's not related to this case.
20 That's the problem. That's the fundamental distinction. It's
21 the -- it's the -- it's the very first case that we cite in our
22 -- in our brief. It's the *Bristol-Myers* case cited -- excuse
23 me, decided last year. The court said, "What is needed is a
24 connection between the forum and the specific claims at issue."

25 THE COURT: And their claim is based on the -- the

1 article that we refer to as the Ragan article.

2 MR. STOWE: That's exactly right. Not --

3 THE COURT: And so you're objecting to going beyond
4 that, that we'll give you everything related to that article,
5 nothing more.

6 MR. STOWE: That's exactly right. And I -- and I
7 think it's good to talk about this in terms of, you know, what
8 if they had done this in their complaint or did this in their
9 complaint? If they had found, for example, some reason to in
10 good faith, consistent with Rule 11, allege general jurisdiction
11 -- for example, let's say that they had found out that my
12 client, CXO, had an outpost office. Recall they're a
13 Massachusetts company. They got all their stuff from
14 Massachusetts. They're incorporated there, principal place of
15 business there, employees there.

16 But let's say that they had found online some reference to
17 an outpost office in Washington and decided on that basis to
18 allege general jurisdiction. We probably wouldn't be having
19 this discussion right now because they would be alleging it, and
20 you had ruled about jurisdictional discovery, and we'd be
21 talking about that. They don't have that.

22 We've been here for a year. They don't -- they know they
23 cannot win on the general jurisdiction ground. That's why --
24 here's what I think is really going on, because when I first
25 read this -- and actually, when I first got the call from them,

1 I -- I couldn't believe they didn't understand that specific is
2 linked to the case, connections to the forum linked to the case,
3 and general is not. I think they know that.

4 What I think is going on here is they know, based on the
5 case law -- in fact, we gave Your Honor some statistics in, I
6 think, our first motion to dismiss where a federal judge had
7 looked at the post-*Daimler* -- that's the case from a couple
8 years ago -- cases finding general jurisdiction over corporation
9 in a state other than its principal place of business or state
10 of incorporation, and it was almost nothing. It was, like,
11 75 cases found they didn't establish it and two found they did;
12 and even as to those two, the federal judge noted they were
13 outliers and explained why. I think they know they can't win on
14 general jurisdiction.

15 So why are we looking at all these requests here? I think
16 what they're doing is they're requesting stuff that everybody in
17 this room knows is related to general jurisdiction, but they're
18 going to try and sweep it into the specific jurisdiction
19 analysis because they -- they're not going to say -- they're
20 saying, "We're not calling it general jurisdiction, Your Honor.
21 We're calling it specific jurisdiction, but we want you to
22 consider stuff that is unrelated to the allegations and claims
23 at issue."

24 So in the *Bristol-Myers* case, for example, they had a -- a
25 plaintiff that sued a drug manufacturer over a specific drug,

1 Plavix. The plaintiff asserted only specific jurisdiction, but
2 it said, "Court, you have specific jurisdiction, and here's
3 something in support: other research relating to other drug
4 research that this company did in the forum." And the Supreme
5 Court said, "No, you're confusing general and specific
6 jurisdiction. Specific is ties to the forum related to your
7 claims, your allegations in this suit." That other drug
8 research, that's not specific jurisdiction.

9 Similarly, we've got here they want information on other
10 articles having nothing to do with the suit. That's general
11 jurisdiction, not specific jurisdiction. We cited several other
12 cases for Your Honor as -- as to the distinction between general
13 and specific and why you can't conflate them to -- conflate the
14 two.

15 I do want to address Keeton. Remember he brought up
16 Keeton? And they brought this up in their reply, not in their
17 opening brief, so I didn't get a chance to file something in
18 response. Here's our response. The sentence and maxim that
19 they cite from Keeton, they cut the sentence off, the key
20 sentence that they put in their brief.

21 They wrote in their brief, quote, "Respondent's regular
22 circulation of magazines in the forum state is sufficient to
23 support an assertion of jurisdiction," and then they put an open
24 bracket, a period, and a closed bracket, end quote. That's not
25 the full sentence. The rest of the sentence says, "in a liable

1 action based on the contents of the magazine."

2 In other words, the Court in -- in *Keeton* was relying on
3 the fact that the specific magazines that contained the liable
4 that they were suing on was circulated in the forum. It's
5 not -- and not the non-magazine at issue circulation in the
6 forum, and it's not just me that reads it that way. Subsequent
7 courts have read it that way. For example, in *In Re*
8 *Testosterone Replacement Therapy Products Liability*, which is
9 cited to 164 F.Supp.3d 1040, the court said:

10 "Nothing in the Supreme Court decisions plaintiffs cite,
11 however, suggest that a court may exercise jurisdiction over a
12 plaintiff's claims against a defendant when those claims are
13 unrelated to the defendants' activities within the forum state.
14 In *Keeton*, for example, the Court ruled that a New Hampshire
15 court could exercise jurisdiction over a defendant magazine
16 publisher based on the publisher's circulation of magazines
17 containing allegedly libelous content within New Hampshire."

18 And then the Court went on to say this, and this is the
19 key: "There is no indication in *Keeton* that the plaintiff could
20 have brought suit in New Hampshire if, for example, the magazine
21 circulated within the state contained only libelous statements
22 related to other unrelated plaintiffs." In other words, the
23 court in *Keeton* wasn't saying you can use unrelated magazines to
24 establish specific jurisdiction, and -- and we know that because
25 just last year, the court in the *Bristol-Myers* case pointed out

1 the very thing that I'm talking about.

2 So how do you reconcile Keeton with the Bristol-Myers from
3 last year? Keeton was from '84. You read Keeton, read the
4 whole case; and you read the sentence, the full sentence, not
5 the half sentence that they quoted in their brief.

6 I just want to point out one thing that's kind of getting
7 lost in all this. We asserted it's not just a matter of
8 specific versus general, Your Honor. It's also overbreadth.
9 You hit this on the head with the -- with the Florida thing. I
10 mean, it's kind of weird because I was thinking about Florida,
11 too.

12 THE COURT: It's been in the news recently so --

13 MR. STOWE: Well, it's not just a matter of general
14 versus specific. We also object because these are entirely
15 overbroad. If they're asking about all documents related to
16 total sales of each of CXO's products or services in the United
17 States generally, I mean, obviously, that's -- that is every
18 sale that we've ever done; you know, a sale in Kentucky or
19 Massachusetts. That has nothing to do with personal
20 jurisdiction in the state of Washington.

21 So the key point is the specific versus general dichotomy.
22 They have conflated the two, and I -- again, I don't think he
23 doesn't understand that. I actually think he -- he realizes
24 that it's actually going to general jurisdiction.

25 THE COURT: But what difference does that make? I

1 mean -- I mean, you know each other better than I do, and I
2 don't really know why I have to know what you think he thinks.

3 MR. STOWE: Yeah.

4 THE COURT: But what difference does it make? If he
5 gets jurisdiction, he gets jurisdiction, right?

6 MR. STOWE: Well, no. Let's say, for example, you
7 ordered and said, "Mr. Stowe, you have your client send them
8 information about stuff having nothing to do with the facts of
9 the case," even though he's alleging only specific jurisdiction,
10 and then he turns around and he takes that information. Let's
11 say -- let's pick one out, CXO's advertising and marketing of
12 CXO media properties.

13 So let's say I produce to him documents relating to
14 advertising of articles from four years ago not related to this
15 suit, and then he says to you, "Your Honor, see, look here.
16 They made a little money off of an article not that we're suing
17 over, it's unrelated, and they made a little money off of people
18 in Washington." They're going to have to if they want to make
19 that and keep it relevant. They're going to have to say general
20 jurisdiction, not specific.

21 THE COURT: No, I -- I understand that. I was --
22 okay.

23 MR. STOWE: And so as a result if they do that, it's
24 not going -- it's not going to help them because it turns out if
25 you read *Daimler* and you read *Goodyear*, that's not general

1 jurisdiction. In your example with the Microsoft, the fact that
2 some CD ended up in -- in Florida does not subject Microsoft to
3 general, not specific. They may be subject to specific in -- in
4 Florida if their contacts with Florida were -- gave rise to the
5 claim. It's not going to help them establish general
6 jurisdiction.

7 It may be relevant. It may be relevant. I'm not saying
8 that revenues related to other articles that come out of
9 Washington, I'm not saying that's not relevant to general
10 jurisdiction. It may be. I'm just saying they're not alleging
11 it because then they know they can't, and hence they can't get
12 the jurisdictional discovery regarding it.

13 THE COURT: But so far, I agree the plaintiffs have --
14 their allegations have suggested specific jurisdiction, and
15 that's been the focus, but they still have 26 hours to file an
16 amended complaint. What's to prevent them from saying, "We've
17 got enough now to allege general jurisdiction." They can do
18 that. And, you know, I'm instructed under the -- by the Ninth
19 Circuit and the court rules to allow amendments quite freely.

20 MR. STOWE: Yes, Your Honor. Your Honor, if they
21 amend their complaint and they think they can do it consistent
22 with Rule 11, then that's a different discussion. I think that
23 you're probably in a position at that point -- now, I can't
24 promise I'm not going to file some sort of motion regarding that
25 because it's so out -- I mean, Your Honor --

1 THE COURT: Well, you can almost promise that you
2 would.

3 MR. STOWE: I'm sorry, Your Honor?

4 THE COURT: Sorry.

5 MR. STOWE: Okay. Well, I'm just saying, look, we're
6 not dealing in a vacuum here. They've seen the evidence. They
7 saw our declarations. These are Massachusetts companies. Their
8 stuff is all in -- they don't have anything near general
9 jurisdiction in Washington.

10 THE COURT: So they could sue you in Massachusetts --

11 MR. STOWE: They could.

12 THE COURT: -- for these causes of action.

13 MR. STOWE: They absolutely could, Your Honor.

14 THE COURT: Then you'd be talking about general
15 jurisdiction and you'd be talking about substance of those.

16 MR. STOWE: Well, we wouldn't. There wouldn't be a
17 fight over personal jurisdiction. We'd have no grounds to fight
18 over it. And, you know, they said in their reply -- I caught
19 that. Did you catch that where they said they haven't suggested
20 any forum where -- did they read the motion, too, that we told
21 you you could sue us up in Massachusetts, because that's an
22 alternative available forum. That's one of the questions that
23 you look at under the -- under the test. So sorry to ramble on.

24 THE COURT: No, you're not. You've been helpful.

25 MR. STOWE: I'm -- I'm happy to take any additional

1 questions that -- oh, one -- one last thing, Your Honor. He
2 cited the *Yahoo* case, and for whoever's looking at this, the
3 *Yahoo* case is no longer good law. He cited the *Yahoo* case for
4 the proposition. He said -- well, it's a direct quote from
5 *Yahoo*. This is a Ninth Circuit case from 2006, and they cite in
6 their brief. "A strong showing on one axis will permit a lesser
7 showing on the other." That's, like, the first point in their
8 reply brief.

9 In other words, in the specific jurisdiction analysis, you
10 have the three prongs, and so this so-called sliding scale test
11 used to say that if you had a lot of contacts that were
12 unrelated to the claims, you don't have -- you're showing on how
13 related they are; it decreases. Well, the court in
14 *Bristol-Myers* just last year said in describing this approach,
15 that sliding scale approach, as it was "difficult to square with
16 our precedence." It said that it "resembles a loose and
17 spurious form of general jurisdiction," and it also said, "Our
18 cases provide no support for this approach." So -- because when
19 I read that, I thought that's very odd specific jurisdiction
20 requires it. Anyway, that's no longer good law, and that's all
21 I've got, Your Honor.

22 THE COURT: Okay. Thank you.

23 All right. I'm going to take this under advisement, but
24 I've got a couple of other questions, and I'm not going to have
25 it under advisement for too long, perhaps by early next week.

1 But we do have a motion to amend a deadline for tomorrow, and we
2 have an amended complaint that's on file.

3 Mr. Neta, it seems to me that even if I give you the
4 opportunity to -- if I rule in your favor and say that the
5 defense should answer some more of these questions, that you
6 have your amendment on file. I mean, I don't see how additional
7 discovery is going to help you amend the complaint. It just may
8 help you win the -- the motion on lack of jurisdiction. Am I
9 wrong in understanding it that way?

10 I mean, we're not -- we're not ready to argue substantively
11 jurisdiction yet. That's going to be -- that's going to be done
12 maybe. Maybe you'll convince the defendant, but that will be
13 done at a later time. You have the amended complaint. You
14 don't need more time to do an amended complaint. That's what
15 I'm getting at.

16 MR. NETA: That's perhaps true, Your Honor. I could
17 use the discovery to perhaps add more facts, perhaps do it in
18 such a way that it would be impossible for the defendant to
19 really put forward a motion to dismiss for lack of personal
20 jurisdiction and that this case gets moving forward as I
21 would've liked it to happen.

22 THE COURT: Well, you can always do that by
23 stipulation. What I'm -- what I'm getting at and why I'm asking
24 the question is I'm taking this under advisement. There's a
25 deadline for tomorrow. My decision, which you won't get until

1 next week, impacts the deadline for tomorrow, but it strikes me
2 that deadline for tomorrow has already been met. You filed your
3 amended complaint, and even if I allow additional discovery on
4 the issue of specific jurisdiction, that just helps you win the
5 argument perhaps, but it doesn't help you amend the complaint.
6 That's what I'm trying to say, but maybe I said it a little more
7 clear the second time.

8 MR. NETA: If we reach a stipulation on it, yes, Your
9 Honor.

10 THE COURT: Okay.

11 MR. NETA: I would think that this discovery will help
12 us amend -- perhaps amend the complaint further.

13 THE COURT: Right. Now, you have already exchanged
14 discovery, and the defense has responded on specific issues
15 regarding the Ragan article; is that correct?

16 MR. NETA: That's correct, Your Honor.

17 THE COURT: All right. All right. I have my
18 questions answered. Did you have anything else you'd like to
19 say in response to the --

20 MR. NETA: Just very quickly, Your Honor. I know your
21 time is limited.

22 THE COURT: No, it's not -- not bad. I'm just -- on
23 discovery, I just try to be very focused, and --

24 MR. NETA: I appreciate --

25 THE COURT: -- attorneys try to be very --

1 MR. NETA: I understand.

2 THE COURT: Try to advocate.

3 MR. NETA: I understand that, Your Honor. All I --

4 THE COURT: Advocacy is not really the point today.

5 I'm just trying to get this case moving forward.

6 MR. NETA: Absolutely. I think it's our obligation to
7 evaluate all of the defendants' contacts with the forum. That's
8 what discovery does. *Bristol-Myers* just has to deal with
9 nonresidence claims. I think if you read *Keeton*, you'll see
10 that we haven't misquoted anything in our brief. This is an
11 internet case, and internet cases like it have found personal
12 jurisdiction even when there are no offices, no employees, no
13 servers, and only two percent of revenue in a given state.

14 There's no alternative forum because we can't hear this
15 case in Massachusetts. Then we'll have all the other defendants
16 saying that they can't be drawn in there, either. This is where
17 the harm was felt, and in every tort case, especially the
18 internet, that's where it --

19 THE COURT: Well, but you could sue -- I mean, I don't
20 know. I'm just throwing this out there. Can't you sue
21 different defendants in different jurisdictions and then bring
22 motions to consolidate?

23 MR. NETA: I -- I don't believe that that would be
24 possible. We're going to get the same arguments and claims from
25 the individuals -- in this case, Chris Vickery and Steve Ragan,

1 who are in Indiana and California and did all their activities
2 in California -- to say, "Well, we can't get dragged in."

3 THE COURT: I'm not suggesting you go do that now. I
4 mean, you've made the choice to sue here, and the question for
5 me soon is did you sue this defendant in the right place and can
6 you proceed? That's really what we're talking about today.

7 MR. NETA: Yeah.

8 THE COURT: Actually, what we're talking about, do you
9 have enough information to make that argument or do you --

10 MR. NETA: Precisely.

11 THE COURT: -- want a little more?

12 MR. NETA: We're -- we're -- we're -- we're not yet at
13 that place. But in terms of alternative available forum, the
14 cases that they cite, there was a very clear place where the
15 case could go because that was the cite of the ax -- editor or
16 something like that. Here, there's four or five different
17 places, including a defendant that's based in Dubai; so slightly
18 different issue.

19 THE COURT: So last issue, and I'll give you both a
20 chance to speak to this. The defendant has requested fees for
21 responding to this. The civil rule doesn't require fees be
22 awarded, but it suggests very strongly that fees should be
23 considered when the parties argue a formal discovery motion.
24 That is in part one of the reasons I make myself available for
25 informal discovery resolution. Informal discovery resolution

1 was not followed here so why shouldn't I -- if I deny your
2 motion on discovery, why shouldn't I award fees to the
3 defendant?

4 MR. NETA: Well, because, Your Honor, I think we were
5 forthright in our efforts to meet and confer with defendant. We
6 asked them numerous times over the course of months for them to
7 produce this document -- these documents. We made it clear that
8 that was important for us. We were forthcoming in our
9 discovery. We produced even one of our party deponents for --
10 for a deposition.

11 We're -- we don't believe this case should come down to a
12 dispute about discovery. Everybody should be forthcoming about
13 the things that are being asked about within reason and so that
14 we figure out what's really going on here so that we move
15 forward. We're trying to be forthcoming, having people appear
16 for discovery, responding to all the discovery, which is
17 considerable, and we're just wanting that exchange.

18 THE COURT: But the issue of fees isn't your behavior.
19 It's kind of more what they have to put through. And they're --
20 and they're saying, "Look, we didn't do anything wrong. You
21 can't sue us here. You're stretching the law by suing us here.
22 You don't have facts sufficient --" I mean, I'm summarizing the
23 arguments that I think I see -- "and your discovery requests go
24 way beyond the issue of specific jurisdiction. We tried to tell
25 you that, yet you've made us come." And I've made everybody

1 come today except for --

2 MR. NETA: Mr. Chung.

3 THE COURT: Thank you. The attorney who -- I said you
4 can appear on the phone only if you don't say anything, but if
5 you want to talk, you have to be here.

6 So they're here at a great deal of cost to them.

7 MR. NETA: As am I, Your Honor, and it's because I
8 care about --

9 THE COURT: Yeah, but you brought the motion.

10 MR. NETA: It's true. It's absolutely true. And with
11 that -- with that said, Your Honor, we're just trying to get --
12 have the parties be forthcoming. We're not the ones placing an
13 obstacle at this point about discovery that we think is just
14 about their contacts with the forum.

15 THE COURT: Well, they argue you are because you're
16 asking for too much information. I'm not -- I'm not accepting
17 their argument. I'm just saying, you know, listen. I practiced
18 law for a lot longer than I've been a judge, and I hated
19 discovery motions just as I'm sure the three of you do.

20 MR. NETA: Absolutely.

21 THE COURT: And I hated the conversation about
22 exchanging fees for those discovery motions. I find it
23 abhorrent usually that I have to do that, but the court rules
24 strongly suggest the Court needs to think about it. I am. And
25 that's one of the reasons I've created an informal dispute

1 resolution for discovery, but that wasn't followed so....

2 MR. NETA: Yeah, I appreciate that, Your Honor. It
3 was really because we felt like this deadline was looming. We
4 had really no choice but to file a motion. And if we felt like
5 we didn't have to amend the complaint and they would've
6 stipulated to an extension of the deadline to amend the
7 complaint, we would've followed that procedure, but we felt like
8 our hands were tied.

9 THE COURT: Very good. That's -- that's your answer.
10 I accept that.

11 MR. NETA: Thank you, Your Honor.

12 Fees. I'll give you a chance to -- to make your pitch.
13 We're not talking about amounts yet. If I decide that fees are
14 appropriate, I'll ask you to file a request. But why should I
15 seriously think about fees?

16 MR. STOWE: Your Honor, I think you pretty much
17 outlined the considerations and -- and outlined what you thought
18 our -- would be a summary of the reason. I think you did that.
19 The only thing I would add to that is there was at one point
20 where you said -- you said, "and they think you've just gone too
21 far, that you've stretched," and that's true. We -- we
22 absolutely do think they have gone too far and they've
23 stretched. But I think what makes it a little different and why
24 actually fees are warranted here is that you see attorneys
25 stretch all the time in -- especially merits discovery. This

1 isn't merits discovery.

2 What I think is different here is that it's stretching on
3 an issue that we should not be discussing, the difference
4 between general and specific. Had they filed an amendment that
5 said general jurisdiction or had they originally alleged, it
6 would be different. This is something that's pretty
7 fundamental, and to try and stretch on it and sweep it into the
8 specific jurisdiction analysis on something that this should not
9 be controversial, specific requires a link between the case and
10 the -- and the ties. That's the reason I think we're a little
11 bit in a different zone here.

12 THE COURT: All right. I appreciate all three of you
13 making your way to Spokane today, and I appreciate the arguments
14 that you've given to me. I have to say I usually would rule
15 from the bench. It's not your fault, but I'm suffering from a
16 cold, and it just kind of slowed me down this week. So give me
17 a few more days to work through this, and I'll get a written
18 decision to you. If I do decide fees are appropriate, I'll give
19 you an opportunity to address that more specifically. All
20 right?

21 MR. STOWE: Understood. Thank you, Your Honor.

22 MR. NETA: In the meantime, Your Honor, is there a
23 deadline for tomorrow in terms of filing a motion for leave to
24 amend?

25 THE COURT: See, that's why I asked that question. I

1 think the deadline is in place, and it seems to me that you've
2 met that deadline. I -- and, I mean, if I'm wrong, that's why
3 I'm giving you a chance to talk about that. I'm not saying that
4 you're prepared to win the issue of jurisdiction. You want some
5 more discovery. I don't know if I'm going to give you that
6 discovery that you want, but I understand that's what you're
7 asking for, but that just gives you evidence to win the motion
8 if the motion is made that --

9 MR. NETA: I'd like some additional discovery. And I
10 will say that despite their refusal to answer basic questions
11 about Washington contacts, we have since obtained some --
12 through some other avenues, further evidence to support their
13 contacts with the state of Washington, and we could certainly
14 include that in the complaint.

15 THE COURT: Well, if you want to file a new complaint
16 by tomorrow, you can. I mean, the other remedy you have if you
17 feel that you need more time to file an amended complaint after
18 you get my decision on discovery, you're free to bring a motion
19 or seek a stipulation. But -- but it seems to me there's two
20 possibilities here; that you've got a looming deadline and you
21 haven't met the deadline, and I understand that that's kind of
22 difficult, but you've met the deadline. You have an amended
23 complaint on file.

24 MR. NETA: Right.

25 THE COURT: So I don't know that I need to move the

1 deadline right now.

2 MR. STOWE: I'm a little unclear because to me -- and
3 maybe we covered this, but I thought -- well, I made clear that
4 what we have produced is the stuff relating to specific. That
5 is the -- the Ragan article and stuff relating --

6 THE COURT: I understand that's your point.

7 MR. STOWE: I understand. But if you ordered more and
8 you're saying that would just support what he -- the amendment
9 that they have already filed --

10 THE COURT: Right.

11 MR. STOWE: -- I'm not sure -- it would be -- if the
12 "more" is what I think it is, i.e. the five requests here, what
13 they filed was specific jurisdiction, not general --

14 THE COURT: Right.

15 MR. STOWE: -- jurisdiction. So if he filed a general
16 jurisdiction amendment by tomorrow, I understand what you're
17 talking about, but maybe I'm confused.

18 MR. NETA: There's still a fundamental dispute between
19 us, William, as to what -- what is specific versus general.

20 But the issue is if Your Honor finds it appropriate to
21 issue -- to compel further discovery, is that something that we
22 could include in the complaint? It sounds like what you're
23 saying, Your Honor, is if we feel that's the case, we can always
24 move at a later date, correct?

25 THE COURT: Exactly, exactly.

1 MR. STOWE: Your Honor, we're going to have, obviously
2 -- I mean, it's been a year.

3 THE COURT: Huh?

4 MR. STOWE: We've been here a year now in this court.

5 MR. NETA: Yeah.

6 THE COURT: That's not an unusual period of time. I
7 like to move things along.

8 Did you have something you'd like to say? I mean, you've
9 been --

10 MR. CURTIS: I just -- I believe -- for clarification,
11 I think what the Court is saying is even would they -- were they
12 to grant defendants' -- plaintiffs' pending motion, even on a
13 limited basis, that would not be dispositive of the overall
14 jurisdiction issue.

15 THE COURT: Right.

16 MR. CURTIS: And so I -- I think that's all the Court
17 is saying at this point in time and trying to get everybody to
18 either understand or agree that that's where we are.

19 THE COURT: Right.

20 MR. CURTIS: Okay.

21 THE COURT: I think you've said it a different way,
22 but you're getting to the same point.

23 MR. CURTIS: Right.

24 THE COURT: And it's not like you're being forced to
25 do something to meet a meaningless deadline because you've

1 already done it.

2 MR. NETA: Yeah.

3 THE COURT: So we have an amended complaint. We don't
4 know if that amended complaint is going to survive yet, and you
5 think you need some additional discovery to make a strong
6 argument to make that amended complaint survive, and I'll decide
7 whether you get that or not, and I'll do that as quickly as
8 possible, but you've got the amended complaint on file.

9 MR. NETA: Yes.

10 THE COURT: So I'm not going to move the deadline.

11 MR. NETA: Understood.

12 THE COURT: Okay.

13 MR. NETA: Thank you, Your Honor.

14 THE COURT: All right.

15 (Court adjourned at 3:27 p.m.)

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2

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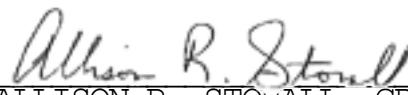
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7 That the foregoing proceedings were taken on the date and
8 place as shown on the first page hereto; and

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10 accurate transcription of the requested proceedings, duly
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12 I do further certify that I am not a relative of, employee
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Spokane, Washington
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